In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-182

JIFFY JUNE FARMS, INC., ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 28a–33a) and its opinion denying rehearing (Pet. App. 36a–40a) are reported at 458 F.2d 1139. The opinion of the district court (Pet. App. 12a–27a) is reported at 324 F. Supp. 664.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1971 (Pet. App. 35a). A timely petition for rehearing was denied on May 17, 1972. The

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petition for a writ of certiorari was filed on August 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the basis of this record, the courts below correctly held that petitioners had failed to prove that each of their 86 driver-employees came within a statutory exemption to the overtime provisions of the Fair Labor Standards Act.

2. Whether the courts below correctly ruled that the Portal-to-Portal Act's three-year statute of limitations for willful violations (29 U.S.C. 255) applies where petitioners knew of the possible applicability of the Fair Labor Standards Act and determined nevertheless to discontinue overtime payments to their drivers.

3. Whether petitioners' agreement with the union representing their employees that the drivers were not entitled to overtime compensation under the Fair Labor Standards Act, reaffirmed by the union when a grievance was filed by some of the drivers, bars either the employees or the Secretary of Labor from instituting suits under Sections 16(b) and 17 of the Fair Labor Standards Act.[1]

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended (29 U.S.C. 201 *et seq.*), Portal-to-Portal Act of 1947, 61 Stat. 84,

[1] This issue was first raised on appeal in a petition for rehearing.

as amended by 80 Stat. 830, 844 (29 U.S.C. 251 *et seq.*), and Motor Carrier Act of 1935, 49 Stat. 543, as amended by the Department of Transportation Act of 1966, 80 Stat. 931, 939–940 (49 U.S.C. 301 *et seq.*), are printed in the petition for a writ of certiorari (Pet. App. 1a–6a).

STATEMENT

This case involves two consolidated actions brought under the Fair Labor Standards Act—one instituted under Section 16(b) (Pet. App. 3a) by eight present and former driver-employees to recover unpaid overtime compensation, liquidated damages, and attorney's fees, and the other instituted under Section 17 (Pet. App. 4a) by the Secretary of Labor to enjoin further violations of the Act's overtime provisions and to restrain the continued withholding of unpaid overtime compensation due to certain drivers not named in the Section 16(b) suit.

Petitioners claimed that the drivers were exempt from the overtime pay provisions of Section 7 of the Fair Labor Standards Act by virtue of Section 13(b)(1) of that Act (29 U.S.C. (1964 ed.) 213(b)(1)), which provides that:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission [now the Secretary of Transportation] has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act * * *.

The district court denied the Section 13(b)(1) exemption, granted the injunctive relief sought by the

Secretary, and awarded the drivers back wages for three years prior to the commencement of the suit (Pet. App. 26a–27a). The court of appeals affirmed (Pet. App. 28a–33a).

The evidence showed that petitioners are engaged in the production, sale, and distribution of poultry products in Alabama (A. 120–121; Pet. App. 13a–14a). The only deliveries outside Alabama, accounting for .23 percent or less of petitioners' total sales, were to two customers on the Florida border (A. 82–85; Pet. App. 21a). Although petitioners had no formally established truck routes, each driver usually drove in the same general territory (A. 231–232, 258–260). More than one third of the Florida deliveries in 1968 were made by a single driver (Defendants' Exh. 3), and most of the 86 drivers involved made no such deliveries.[2] The drivers also picked up boxes and poultry products which had been delivered from out-of-state to warehouses where they were stored until called for by petitioners' drivers (A. 144–147, 153–154, 160–162, 165–166, 203–205, 224; Pet App. 15a–16a).[3]

Petitioners paid their drivers for overtime in accordance with Section 7 of the Fair Labor Standards Act until August 1966 (A. 180–181). Then, in the

[2] This figure includes the eight plaintiffs in the Section 16(b) action, and seventy-eight individuals benefitted by the Secretary's Section 17 action (A. 48–49; 96–98). The difference between this figure and the "67 working men" referred to in the district court's opinion reflects the fact that several men were added before judgment was entered.

[3] The drivers also loaded trucks. This activity was held below not to be a basis for exemption under Section 13(b)(1), and that holding is not challenged here (see Pet. 16).

course of negotiating a collective bargaining agreement involving an increase in the drivers' hourly wage rate, the newly certified union suggested that the Act did not apply to the drivers, because of the Section 13(b)(1) exemption relied on below by the petitioners (A. 181–182). The drivers filed a grievance which was never submitted to arbitration, since the union and petitioners agreed that the drivers were not entitled to overtime (A. 194–195). The drivers then complained to the Department of Labor (A. 234–235, 285–286); these actions followed.

ARGUMENT

1. The courts below correctly held that the Section 13(b)(1) exemption did not apply to the drivers here, since the "minimum of evidence of interstate activity which is minimal in its scope and minimal in its nature" (Pet. App. 25a) introduced by petitioners failed to show that any of these drivers was subject to the jurisdiction of the Department of Transportation under the Motor Carrier Act (Pet. App. 19a).

Contrary to petitioners' contention (Pet. 9–11, 16), that holding does not conflict with *Starrett* v. *Bruce,* 391 F. 2d 320 (C.A. 10), certiorari denied, 393 U.S. 971, which was concerned with a carrier actively seeking interstate business and which had only one driver, who would, therefore, perform whatever interstate business the carrier might be called upon to handle. In this respect, the single driver was like the pool of drivers in *Morris* v. *McComb,* 332 U.S. 422, who, in the normal operation of the business, were all equally

likely to be called upon to perform such interstate transportation as the shipping public might require.[4] Here the evidence showed that only a few drivers ever handled the Florida deliveries and that petitioners could easily have identified these drivers from their records, but chose not to do so.

In these circumstances, and in light of the settled rule that the Section 13(b)(1) exemption is an "employee" exemption (*Goldberg* v. *Faber Industries, Inc.*, 291 F. 2d 232, 235 (C.A. 7); *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 553; *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2), certiorari granted, 326 U.S. 716, certiorari dismissed, 328 U.S. 819), so that every condition for exemption must be shown with respect to each employee for whom exemption is claimed (*Wirtz* v. *C & P Shoe Corporation*, 336 F. 2d 21, 28 (C.A. 5)), the courts below were fully justified in refusing to grant the exemption to all 86 drivers simply because a few of these drivers made deliveries into Florida.[5]

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[4] In *Morris*, "[t]he average number of drivers making one or more [interstate] trips in each week was nine drivers out of 37"; "[t]here were six weeks in which more than half of the drivers * * * engaged directly in interstate commerce"; and there was one week in "which 25 drivers, out of the 32 then on duty, did so" (322 U.S. at 433). As is thus apparent, the drivers in *Morris* "shared indiscriminately" in the performance of the interstate trips which were a "natural" and "apparently inseparable part of the common carrier service of the petitioner and of his drivers" (322 U.S. at 433).

[5] The fact that certain drivers substituted on the Florida run once or twice over a period of several years would not subject the drivers to the safety jurisdiction of the I.C.C.; that

Nor did the courts below misapply the principles of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (Pet. 17), in holding that the boxes and poultry products picked up by the drivers had reached their destination when they arrived at the warehouses in Alabama where they were stored until needed by petitioners. They thus were no longer moving in interstate commerce when transported by the drivers within Alabama. The warehouses, like the bulk plant involved in *Baird* v. *Wagoner Transportation Company*, 425 F. 2d 407 (C.A. 6), certiorari denied, 400 U.S. 829, and also in *Mitchell* v. *Livingston & Thebaut Oil Company*, 256 F. 2d 757 (C.A. 5), were "used more in the nature of a storage or inventory facility" (*Baird* v. *Wagoner, supra*, 425 F. 2d at 412), than as a temporary pause in the continuous interstate movement of goods from a manufacturer to a purchaser.

2. The court below held that the word "willful," as used in the Portal-to-Portal Act's three-year statute of limitations, applies to violations committed in reliance on the advice of counsel, with awareness of the possible applicability of the Act, although without intent to evade the Act. This decision not only accords with the construction given this term or its equivalent in other civil legislation (see, *e.g.*, *Local 189, United Papermak. & Paperworkers* v. *United States*, 416 F. 2d 980, 996 (C.A. 5), certiorari denied, 397 U.S. 919;

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jurisdiction does not extend to employees who perform safety-affecting activities only "sporadically and infrequently" and not as "part of their regular duties" (*Wirtz* v. *Tyler Pipe and Foundry Company*, 369 F. 2d 927, 930 (C.A. 5); *Wirtz* v. *C & P Shoe*, *supra*, 336 F. 2d at 29).

Robinson v. *Lorillard Corp.*, 444 F. 2d 791, 796–797 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 250 (C.A. 10); *Sprogis* v. *United Airlines*, 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, 404 U.S. 991; *Hewitt* v. *United States*, 377 F. 2d 921, 924 (C.A. 5)), but is required, we submit, by the Act's broad remedial purposes. Petitioners erroneously describe the three-year statute of limitations as "punitive in its effect" (Pet. 18). As pointed out by the court below, however, the three-year statute is part of the Act's civil sanctions (Pet. App. 37a); it is thus clearly compensatory in nature.

3. The court of appeals correctly rejected petitioners' claim that the employees, as well as the Secretary of Labor, were precluded from maintaining suit under the Act to recover the unpaid overtime compensation which certain of the employees had, without success, sought to obtain by invoking the grievance machinery of their collective bargaining agreement. As the court pointed out, and as petitioners' own evidence confirmed, the union proposed the cessation of overtime payments and, when the grievance was filed, supported petitioners' right to stop such payments. In these circumstances, the grievance proceeding was properly characterized by the court below as "a hopeless charade" (Pet. App. 40a).

Even apart from this ruling, it is clear that the maneuverings of individual employees cannot bar the Secretary from instituting action under Section 17 of the Act, since such actions are brought, not for the

benefit of particular employees, but to protect the public interest. See *Wirtz* v. *Jones,* 340 F.2d 901, 904 (C.A. 5); *Wirtz* v. *Malthor, Inc.,* 391 F.2d 1, 3 (C.A. 9). It is well settled, moreover, that the minimum guarantees provided in Sections 6 and 7 of the Act cannot be waived or diminished by contract. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707; *Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173, 177–178; *Walling* v. *Hardwood Co.,* 325 U.S. 419.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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